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November 19, 2003

Ms. Marlene Dortch  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

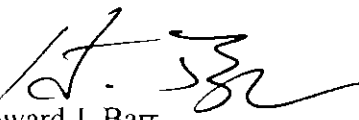
Re: **WT Docket No. 03-203**  
**Reply to Opposition**

Dear Ms. Dortch:

Transmitted herewith on behalf of Instructional Telecommunications Foundation, Inc. is an original and four copies of its Reply to Opposition with respect to the above-referenced matter.

Should any questions arise in connection with this matter, kindly contact the undersigned.

Respectfully submitted,

  
Howard J. Barr

Enclosures

cc Service List

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D C 20554

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NOV 19 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In Re )  
 )  
Applications to Assign Wireless )  
Licenses from WorldCom, Inc )  
(Debtor-in-Possession) to Nextel )  
Spectrum Acquisition Corp )

WT Docket No. 03-203

To Chief, Wireless Telecommunications Bureau

**REPLY TO OPPOSITION**

Instructional Telecommunications Foundation, Inc. ("ITF"), by counsel hereby submits its Reply to Nextel Communications, Inc.'s ("Nextel") and WorldCom, Inc.'s ("WorldCom") (collectively "Joint Parties") Joint Opposition to Petitions to Deny in the above-captioned matter. The following is shown in support thereof:<sup>1</sup>

**I. ITF's Allegations are Particularly Relevant to the Proceeding**

Joint Parties failed completely to address the merits of ITF's Petition. That failure should be deemed an admission of the facts as stated by ITF. Their election to hide behind procedural arguments raises more questions than answers.

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<sup>1</sup> The Commission's Public Notice, DA 03-2948, released September 25, 2003, did not establish a reply deadline or otherwise provide for the submission of replies in this proceeding. In establishing the relevant pleading cycle, the Commission, without explanation, relied upon Sections 1.415 and 1.419 of its rules. Section 1.415 addresses the establishment of pleading cycles in notice and comment rule making proceedings. See, e.g., 1.415(a) ("After *notice of proposed rulemaking is issued*, the Commission will afford interested persons an opportunity to participate in the rulemaking proceeding through submission of written data, views, or arguments, with or without opportunity to present the same orally in any manner") (emphasis added). Section 1.419 addresses the form of comments and replies in such proceedings. This is not a notice and comment rule making proceeding, but a proceeding to consider whether the public interest will be served by a grant of the assignment applications filed in the above-captioned docket. Therefore, the pleading cycle provided for in Sections 1.939 and 1.45 of the Commission's rules should control (Joint Parties implicitly concede the relevance of 1.939 given their reliance upon that section for their contention that ITF's petition should be dismissed for failure of service on Nextel (*infra*). Both of those rules make provision for the filing of a reply to any opposition. Accordingly, ITF submits that this submission is permitted under the rules. To the extent necessary, ITF respectfully requests that it be accepted for consideration in this matter.

Joint Parties' contention that ITF is without standing to object should be rejected. ITF's Petition was properly filed in the context of this case. The uncontested facts are that WorldCom petitioned to deny ITF's G Group modification with full knowledge that its objection lacked any basis in fact and that it was filed in furtherance of an ulterior motive, i.e., to obstruct and delay ITF's ability to operate in Philadelphia in hopes of securing business advantage

WorldCom's petition to deny ITF's application to modify its ITFS G Group facilities in Philadelphia was frivolous and an abuse of process. The Commission has long held that "licensees should 'be held accountable for their stewardship and will not be allowed to evade the consequences of their misconduct or abuse of a license by selling the station'."<sup>2</sup> Accordingly, "under the *Jefferson Radio* policy, the Commission withholds action on assignment and transfer applications where the seller's qualifications to continue holding the license are in issue."<sup>3</sup>

The Commission's "policy is broadly grounded on the need to deter licensee misconduct"<sup>4</sup> The Commission should enforce its policies here by finding that WorldCom's conduct is particularly relevant to this proceeding and bears directly upon its qualifications to be a Commission licensee.<sup>5</sup>

As demonstrated above, and contrary to Joint Parties' allegation, ITF's Petition is not merely an attempt on its part to "re-litigate its own application pending before the Commission."<sup>6</sup> Indeed, since no decision has been rendered in that matter, there is nothing as of yet to re-litigate.

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<sup>2</sup> *Roy M. Speer*, 11 FCC Rcd 14147 (1996), quoting, *1400 Corp.*, 4 FCC 2d 715, 716 (1966) (subsequent history omitted) See also *Jefferson Radio Company v. FCC*, 340 F.2d 781 (D.C. Cir. 1984) (action to be withheld on assignment and transfer applications where the Seller's qualifications to continue holding the license are in issue)

<sup>3</sup> *Id.*, citing *Jefferson Radio*, 340 F.2d at 781

<sup>4</sup> *Id.*, citing *1400 Corp.*, 4 FCC 2d 715, 716 (1966), modified, 7 FCC 2d 517 (1967)

<sup>5</sup> While it considers this matter, the Commission may also take official notice of the various other allegations of misconduct by WorldCom. See RM-10613, WC Docket No. 02-215

<sup>6</sup> Opposition at p. 5

ITF's petition raises serious allegations of abuse of process that must be resolved before the Commission can allow the proposed transaction to proceed.

## **II. ITF Has Standing to Object**

Joint Parties also urge too strict a measure for standing in this proceeding. The Commission has long "relie[d] on members of the public to act as private attorneys general to assist in overseeing the conduct of applicants and licensees and in fulfilling our statutory functions"<sup>7</sup> "[T]hrough [its] private interest . . . [ITF] represent[s] a factor affecting the public interest"<sup>8</sup> The Commission has also rejected technical issues of standing in the face of allegations of violations of its rules<sup>9</sup> Furthermore, ITF raises these issues here not merely to obtain adjudication of its private interests, but to "vindicate the broad public interest," a basis upon which the Commission has long permitted standing<sup>10</sup>

Should the Commission find that ITF is without standing to petition for denial, it respectfully requests that its Petition be treated as an informal objection, for which there is no standing requirement<sup>11</sup> Moreover, the Public Notice of acceptance in this matter invited not only petitions to deny the applications, but comments as well Accordingly, ITF's submission was properly filed in this matter and is entitled to consideration

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<sup>7</sup> 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes, Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, 13 FCC Rcd 23056, para. 18 (1998)

<sup>8</sup> *Giant v. FCC*, 234 F.2d 682, 684 (DC Cir. 1956)

<sup>9</sup> *Focus Cable of Oakland, Inc.*, 46 FCC 2d 112, para. 6 (1974) ("To the extent that petitioners accuse Focus of overt violation of our rules, it is farfetched even to raise an issue of standing clearly our interest in the enforcement of the rules transcends this technical issue")

<sup>10</sup> *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (DC Cir. 1966)

<sup>11</sup> *Nextel License Holdings 4, Inc. Nextel WIP License Corp.*, 17 FCC Rcd 7028 (2002) (Commission treated certain petitions to deny as informal objections where petitioners lacked standing)

### III. Joint Parties Were not Prevented from Trying to Settle this Matter

Joint Parties fail to explain how Section 1.935 of the Commission's rules would have prevented a resolution to the *WorldCom created G Group* dilemma. Section 1.935 merely requires a party withdrawing or requesting dismissal of a petition to deny or refraining from filing a pleading to "submit to the Commission a request for approval of the withdrawal or dismissal, a copy of any written agreement related to the withdrawal or dismissal, and an affidavit" addressing certain particulars; none of which would have prevented a settlement of this matter<sup>12</sup>

The Commission "encourage[s] settlement of conflicts in order to eliminate the need for further litigation and the expenditure of further time and resources by the parties and the Commission, and to speed service to the public"<sup>13</sup> and would likely have been receptive to a settlement of the pending issues. Indeed, federal agencies are under Executive Order to encourage appropriate settlement of claims and to use ADR whenever feasible<sup>14</sup>

Moreover, not only are efforts, such as ITF's, to resolve disputes pre-filing encouraged by the Commission, in certain instances such efforts are mandatory.<sup>15</sup> Joint Parties mockery of ITF's efforts to avoid continued conflict stands in stark contrast to the Commission's findings that "settlement discussions prior to filing a formal complaint will result in (1) more disputes

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<sup>12</sup> Section 1.935(a) of the Commission's rules

<sup>13</sup> *Sunset Bus and Commercial, Inc.* 18 FCC Rcd 1915, para. 6 (February 14, 2003) (internal citations omitted)

<sup>14</sup> See Exec. Order No. 12,988, 61 FR 4729 (1996)

<sup>15</sup> See, e.g., Section 1.721 of the Commission's rules (requiring complainants to certify that it has, in good faith, discussed or attempted to discuss the possibility of settlement with each defendant prior to the filing of the formal complaint)

being settled amicably, and (2) the scope of the issues in dispute in formal complaints being narrowed where possible”<sup>16</sup>

#### **IV. Joint Parties Have Not Been Prejudiced**

Joint Parties assertion that ITF’s Petition to Deny should be dismissed for lack of service on Nextel should be rejected. The Commission does not typically sanction parties for failures to satisfy its procedural requirements where no prejudice befalls the other party by virtue of the procedural error.<sup>17</sup> Neither Nextel nor the Joint Parties suffered any prejudice as a result of the lack of service on Nextel. Indeed, Joint Parties do not even allege they were prejudiced by the procedural error much less demonstrate how they were prejudiced.<sup>18</sup>

Immediately upon being made aware of the service failure, counsel for ITF took steps to cure the defect. Counsel for WorldCom, who had been provided with an electronic version of ITF’s filing, made that unnecessary as he provided a copy to Nextel subsequent to his receipt of the electronic version of the pleading he had requested from ITF’s counsel.<sup>19</sup> Joint Parties, including Nextel, had actual notice of the filing well in advance of the filing deadline and suffered no prejudice by virtue of the oversight. Accordingly, their request for dismissal should be denied.<sup>20</sup>

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<sup>16</sup> *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 FCC Rcd 22497, para. 41 (1997)

<sup>17</sup> *See AT&T Corporation v. Bell Atlantic*, 14 FCC Rcd 556, para. 105 (1998) (“since we find Bell Atlantic suffered no prejudice, we need not address its claim that the notice was defective”)

<sup>18</sup> *See D.D. Cable Holdings, Inc.*, 11 FCC Rcd 10593, para. 20 (1996) (Commission accepts late filed opposition where other party did not even claim prejudice)

<sup>19</sup> *See Exhibit One*. Joint Parties noticeably fail to mention ITF’s prompt effort to cure the defect.

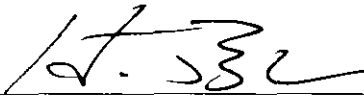
<sup>20</sup> *See International Telecharge, Inc. v. Southwestern Bell Telephone*, 11 FCC Rcd 10061, para. 43 (1996)

## **CONCLUSION**

Wherefore, the premises considered, Instructional Telecommunications Foundation, Inc respectfully requests that the Commission deny the Applications. In the alternative, the Commission should either order WorldCom/Nextel to allow ITF to return ITFS station WHR527 to its authorized parameters, pursuant to commercially reasonable arrangements, or to withdraw (and to authorize the withdrawal of) the pending petitions to deny and support grant of WHR527's proposed modification

Respectfully submitted,

**INSTRUCTIONAL TELECOMMUNICATIONS  
FOUNDATION, INC.**

By   
Howard J Barr

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November 19, 2003

**Certificate of Service**

I, Dina Etemadi, hereby certify that on this 19<sup>th</sup> day of November, 2003, I have caused copies of the foregoing Reply to Opposition to be sent by first class United States mail, postage prepaid, to the following:

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